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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARIO GARCIA, Plaintiff and Appellant, v. MAJDI J. GHARIB, Defendant and Respondent.	B266623 (Los Angeles County Super. Ct. No. BC528300)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Reversed in part, affirmed in part, and remanded.

Law Offices of Ramin R. Younessi, Ramin R. Younessi, Christina M. Coleman, for Plaintiff and Appellant.

Law Office of Richard Meaglia, Richard Meaglia, for Defendant and Respondent.

INTRODUCTION

Mario Garcia brought an action alleging numerous employment-related causes of action (employment action) against LA Parking System, Inc. (LA Parking) and its alleged owner, Majdi Gharib. The parties settled that action, with LA Parking agreeing to pay Garcia $18,000. Garcia subsequently brought the instant action against LA Parking, Gharib, and Car Park, Inc. (Car Park) asserting claims based on LA Parking's alleged failure to pay the sum due under the settlement of his employment action. Default was entered against LA Parking and the parties stipulated to dismiss Car Park with prejudice. The trial court sustained Gharib's demurrer to the second amended complaint without leave to amend, dismissed Garcia's action with prejudice as to Gharib, and entered judgment in Gharib's favor. Garcia appeals from that judgment.[1] We reverse the trial court's order sustaining Gharib's demurrer as to Garcia's rescission and conversion causes of action and the resulting judgment, and affirm the trial court's order sustaining Gharib's demurrer to Garcia's equitable estoppel and declaratory relief causes of action.

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[1] Neither LA Parking nor Car Park is a party to this appeal.

BACKGROUND

As relevant here, in his second amended complaint, Garcia asserted causes of action against Gharib for equitable estoppel, rescission, declaratory relief, and conversion.[2] Garcia alleged that LA Parking, a suspended California corporation, and Car Park were car valet companies that parked vehicles for customers at various locations in Los Angeles. Gharib was the sole shareholder, director, and officer of LA Parking and Car Park which he acted through and controlled. LA Parking and Car Park were Gharib's alter egos and LA Parking, Car Park, and Gharib commingled their assets, which they transferred among each other to avoid liability to their creditors.

Garcia further alleged that in May 2011, he brought his employment action. In June 2012, he attended a settlement conference before Judge William Highberger in Los Angeles County Superior Court. Through his attorney, Gharib, on behalf of himself and LA Parking, offered to pay Garcia $18,000 payable

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[2] Garcia also asserted causes of action against Gharib for fraudulent inducement and negligent misrepresentation. The trial court sustained Gharib's demurrer as to those causes of action and entered judgment. Garcia does not challenge those rulings in this appeal.

in eight installments.[3] Based on Gharib and LA Parking's representation that the "settlement monies would actually be paid" to him, Garcia accepted the offer and "the parties made an oral stipulation." Garcia would not have entered into the settlement agreement or dismissed his employment action if he was not going to receive the settlement sum.

The settlement agreement was memorialized on the record.[4] In memorializing the settlement, the trial court asked Gharib if he was authorized to act on behalf of LA Parking and to bind them to the proposed settlement. Gharib responded that he was. The trial court asked Gharib his position within LA Parking. Gharib responded that he was LA Parking's president. The trial court said, "Okay. And obviously you're authorized to act on their behalf." Gharib responded, "Yes, your Honor." The trial court asked Gharib's attorney, "No question about capacity,

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[3] The reporter's transcript of the settlement conference, which Garcia attached to the second amended complaint, reflects that only LA Parking agreed to make the payments to Garcia.

[4] Although not attached to the second amended complaint, the parties formalized their settlement in a written Settlement and Release Agreement that Garcia attached to a motion to set aside the dismissal and/or the settlement that he filed in his employment action. The trial court in this action took judicial notice of the set aside motion and attached written settlement agreement.

counsel?" Defense counsel responded, "No. I'm not aware of any."

In August 2012, Garcia executed a request for dismissal with prejudice. As of November 21, 2013, Garcia had not received any payment of the money owed under the settlement agreement, despite repeated demands.

In his cause of action for fraudulent inducement,[5] Garcia alleged that Gharib, through his attorney, fraudulently induced Garcia to enter into the settlement agreement by making the materially false representation "[t]hat LA Parking would actually pay to [Garcia] the total sum and consideration of $18,000." Gharib never intended to pay Garcia the settlement sum or any other sum. When he falsely stated that he would pay Garcia $18,000, he knew that he and the other defendants lacked the financial ability to pay the settlement sum and that defendants intended to shut down LA Parking and transfer its assets to Car Park. The misrepresentation was designed to induce Garcia into dismissing his employment action and forgoing his right to trial. Garcia relied on the misrepresentation to enter into the settlement agreement and dismiss his employment action. As

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[5] We set forth the allegations in Garcia's fraudulent inducement cause of action even though Garcia does not challenge on appeal the trial court's ruling as to that cause of action because those allegations are incorporated in and serve in large part as the factual basis for the causes of action that are in issue in this appeal.

needed, we set forth in our discussion below additional facts alleged.

DISCUSSION

I. Standard of Review

"On appeal from a judgment after an order sustaining a demurrer, our standard of review is de novo. We exercise our independent judgment about whether, as a matter of law, the complaint states facts sufficient to state a cause of action. [Citations.] We view a demurrer as admitting all material facts properly pleaded but not contentions, deductions, or conclusions of fact or law. [Citation.]" (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700-701.) When a trial court has sustained a demurrer without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[U]nless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

II. Rescission

Garcia contends that the trial court erred in determining that the litigation privilege in Civil Code section 47, subdivision (b)(2) (section 47, subdivision (b)(2)) barred his rescission cause of action based on Gharib's false statements inducing him to settle his employment action. He further contends that he stated a valid cause of action for rescission based on failure of consideration. We agree with Garcia that he stated a valid cause of action for rescission based on failure of consideration and, accordingly, reverse the trial court's order sustaining Gharib's demurrer as to this cause of action and resulting judgment.[6]

In his rescission cause of action, Garcia alleged that the oral settlement agreement on the record and the Settlement and Release Agreement constituted a contract between the parties. Gharib, through his attorney, falsely represented to Garcia that Garcia would be paid the settlement sum. Gharib made the false statement with the intent to deceive Garcia and to induce Garcia

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[6] "Ordinarily, a general demurrer does not lie as to a portion of a cause of action and if any part of a cause of action is properly pleaded, the demurrer will be overruled." (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452.) Because we have determined that Garcia stated a valid rescission cause of action based on failure of consideration, we need not address whether the litigation privilege applied to that part of Garcia's rescission cause of action based on Gharib's allegedly false statements. (*Elder v. Pacific Bell Telephone Co.* (2012) 205 Cal.App.4th 841, 856.)

to enter into the contract. Garcia entered into the contract in reasonable reliance on Gharib's false statement. Garcia further alleged that the purported consideration for the dismissal and releases he gave Gharib failed because Garcia was not paid any portion of the settlement sum. Garcia alleged, "based on [Gharib's] fraud and/or . . . failure of consideration, [Garcia] rescinds the Release and notifies [Gharib] in writing that he has rescinded."

"As provided for in section 1689 of the Civil Code, failure of consideration authorizes a rescission."[7] (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 411.) "Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party." (*Bliss v. California Cooperative Producers* (1947) 30 Cal.2d 240, 248.) "Case law has uniformly held that a failure of consideration must be 'material,' or go to the 'essence' of the contract before rescission is appropriate. (*Crofoot Lumber, Inc. v. Thompson* (1958) 163 Cal.App.2d 324, 332-33; *Integrated, Inc. v. Alec Fergusson Electrical Contractor* (1967) 250 Cal.App.2d 287, 295-96.)" (*Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 403-404.)

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[7] Civil Code section 1689, subdivision (b)(2) provides, "(b) A party to a contract may rescind the contract in the following cases: [¶] . . . [¶] (2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds."

In his second amended complaint, Garcia alleged that as of November 21, 2013, "despite repeated demands for payment of said settlement monies, [Garcia] has not received any settlement monies . . . ." He further alleged, "By this lawsuit, based upon [Gharib's] . . . failure of consideration, [Garcia] rescinds the Release and notifies [Gharib] in writing that he has rescinded." Gharib did not address the failure of consideration allegations asserted in Garcia's rescission cause of action in his demurrer, and the trial court did not address the issue in its ruling. Garcia's allegation that he had not been paid any of the money owed under the settlement of his employment action—i.e., a material failure—despite repeated demands was sufficient to state a cause of action for rescission based on failure of consideration. (Civ. Code, § 1689; *Bliss v. California Cooperative Producers, supra,* 30 Cal.2d at p. 248; *Wyler v. Feuer, supra,* 85 Cal.App.3d at pp. 403-404; *Taliaferro v. Davis, supra,* 216 Cal.App.2d at p. 411.) Proof of the failure of consideration does not appear to depend upon matters that may be subject to the litigation privilege. Accordingly, the trial court's order sustaining without leave to amend the rescission cause of action and the resulting judgment are reversed.

III. Conversion

Garcia argues that the trial court erred in ruling that the litigation privilege barred his conversion cause of action[8] and he properly pleaded a conversion cause of action. In his conversion cause of action, Garcia alleged that after the execution of the Settlement and Release Agreement, Gharib and Car Park converted the $18,000 settlement sum that LA Parking was to pay Garcia under the settlement agreement. "The amount converted," Garcia alleged, was "a specific sum, equal to the amount Defendant LA PARKING agreed, but failed and refused,

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[8] The trial court initially ruled, "In this case, . . . [Garcia's] tort claims are barred by the [litigation] privilege. Accordingly, Gharib's demurrer to the [Second Amended Complaint]'s cause[] of action for . . . Conversion (ninth) is SUSTAINED." Later, however, the trial court ruled, "Where a complaint alleges an independent, 'noncommunicative,' wrongful act, the litigation privilege is not a bar. (*Optional Capital, Inc. v. DAS Corporation* (2014) 222 Cal.App.4th 1388, [1404-1405].) Garcia alleges that Gharib, independent of his statements relating to the settlement, converted $18,000 from LA Parking that was to be used to make the settlement payment. This allegation is an independent, noncommunicative, wrongful act to which the litigation privilege is not a bar." We deem the trial court's initial ruling to have been made inadvertently and its second, correct, ruling to be its ruling on the issue. Gharib concedes that the litigation privilege did not bar Garcia's conversion cause of action. Accordingly, we do not further address the litigation privilege's application to Garcia's conversion cause of action.

to tender [Garcia], and of which instead Defendants GHARIB and CAR PARK took possession and control."[9]

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages . . . . [Citation.]'" (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387.) Money can be the subject of conversion if the claim involves a specific, identifiable sum. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.)

"Neither legal title nor absolute ownership of the property is necessary. [Citation.] A party need only allege it is '*entitled to immediate possession at the time of conversion*. [Citations.]' [Citation.] However, a mere contractual right of payment, without more, will not suffice." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452 (*Farmers*).) "The existence of a lien, however, can establish the immediate right to possess needed for conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) A "promise to pay from a specific fund

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[9] Although Garcia's conversion cause of action that seeks to recover the payments owed under the settlement agreement appears to be inconsistent with his rescission cause of action that seeks to rescind the settlement agreement, a "plaintiff may plead inconsistent, mutually exclusive remedies . . . in the same complaint." (*Walton v. Walton* (1995) 31 Cal.App.4th 277, 292.)

may suffice to create an equitable lien if considerations of detrimental reliance or unjust enrichment are implicated." (*Farmers, supra,* 53 Cal.App.4th at p. 455.)

Here, the trial court ruled that Garcia never had possession of or title to the $18,000 settlement sum and had not alleged that he had a lien on that sum. Instead, the trial court ruled, Garcia merely had alleged that he a contractual right of payment and such a right did not establish Garcia's entitlement to immediate possession of the settlement sum. (*Farmers, supra,* 53 Cal.App.4th at p. 452.)

We agree with the trial court that Garcia's conversion cause of action, as pleaded, failed to state a claim for conversion and conclude that the trial court properly sustained Gharib's demurrer to that cause of action. The trial court erred, however, in denying Garcia leave to amend. Garcia's right to the settlement sum would support a conversion cause of action if Garcia could establish an equitable lien in that sum. Relying on *Farmers, supra,* 53 Cal.App.4th at page 455, Garcia argues that he can amend his conversion cause of action to establish such an equitable lien through allegations that he detrimentally relied on Gharib's representations and Gharib was unjustly enriched as a result. Garcia's proposed amendments establish "a reasonable possibility" that he can cure the defects in his conversion cause of action. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

Accordingly, the trial court erred in denying him leave to amend. (*Ibid.*)

IV. Equitable Estoppel

Garcia contends that the trial court erred in sustaining without leave to amend Gharib's demurrer to Garcia's equitable estoppel cause of action because the litigation privilege does not bar equitable claims and because he properly stated a cause of action for equitable estoppel. Because, as a matter of law, there is no cause of action for equitable estoppel, we affirm the trial court's ruling.

In his equitable estoppel cause of action, Garcia alleged that he reasonably relied on Gharib's representation that the settlement sum would be paid to him when he agreed to settle his employment action. Garcia did not know that Gharib did not have the ability or intent to pay any part of the settlement sum and had misrepresented his intent to pay Garcia to induce Garcia to settle the employment action. Because Garcia "suffered a prejudicial change in position as a result of his reasonable reliance on [Gharib's] conduct," Gharib was "estopped from enforcing or relying upon the Settlement and Release Agreement."

"Witkin explains that '[a] valid claim of equitable estoppel consists of the following elements: (a) a representation or

concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it.' (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527-528.)" (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1463.) However, "[t]he equitable estoppel doctrine acts defensively only. Thus, there is no stand-alone cause of action for equitable estoppel as a matter of law." (*Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, 513, fn. 15; *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782; *Behnke v. State Farm General Ins. Co. supra,* 196 Cal.App.4th at p. 1463 ["As a stand-alone cause of action for equitable estoppel will not lie as a matter of law, the court properly sustained State Farm's general demurrer to Behnke's equitable estoppel claim"]; *Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 732.) Here, Gharib is seeking no affirmative relief under the Settlement and Release Agreement, so there is nothing for Garcia to estop. Because, as a matter of law, there is no stand-alone cause of action for equitable estoppel, the trial court properly sustained, without leave to amend, Gharib's demurrer to Garcia's equitable estoppel cause of action.

V. Declaratory Relief

Garcia argues that the trial court erred in sustaining without leave to amend Gharib's demurrer to Garcia's cause of action for declaratory relief because the litigation privilege does not bar equitable claims and because he properly stated a cause of action for declaratory relief. Because Garcia's declaratory relief cause of action is based on his claim that he settled his employment action against Gharib based on Gharib's fraudulent statement that Garcia would be paid the settlement sum, Garcia's claim for declaratory relief is barred by the litigation privilege in section 47, subdivision (b)(2).

In his cause of action for declaratory relief, Garcia claimed that an actual, imminent, and justiciable controversy existed over the parties' rights and duties under the "oral agreement on the record and Settlement and Release Agreement." Garcia requested the trial court to declare that "a. The oral agreement on the record and Settlement and Release Agreement were not validly entered into as there was no meeting of the minds on the material terms due to [Gharib's] fraudulent inducement; [¶] b. If validly entered into, the oral agreement on the record and Settlement and Release Agreement were properly rescinded; and [¶] c. The oral agreement on the record and Settlement and Release Agreement are of no force and effect, and are not binding upon [Garcia]."

Section 47, subdivision (b)(2) defines a "privileged publication or broadcast" as one made in "any judicial proceeding." "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The primary purpose of the litigation privilege "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" (*Id.* at p. 213.)

"To effectuate its vital purposes, the litigation privilege is held to be absolute in nature. [Citations.] . . . [The litigation privilege] has been held to immunize defendants from tort liability based on theories of abuse of process [citations], intentional infliction of emotional distress [citations], intentional inducement of breach of contract [citations], intentional interference with prospective economic advantage [citation], negligent misrepresentation [citation], invasion of privacy [citation], negligence [citations] and fraud [citations]. The only exception to application of [the litigation privilege] to tort suits has been for malicious prosecution actions. [Citations.]" (*Silberg v. Anderson, supra,* 50 Cal.3d at pp. 215-216.) "Any doubt as to

whether the privilege applies is resolved in favor of applying it. [Citations.]" (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.)

However, "[t]he litigation privilege does not apply to an equitable action to set aside a settlement agreement for extrinsic fraud. (*Silberg v. Anderson, supra*, 50 Cal.3d 205, 214.)" (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 26 (*Home Ins. Co*).) "'Fraud is extrinsic where the defrauded party was deprived of the opportunity to present his or her claim or defense to the court, that is, where he or she was kept in ignorance or in some other manner, other than from his or her own conduct, fraudulently prevented from fully participating in the proceeding.'" (*Id.* at pp. 26-27.) "Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). [Citation.] The essence of extrinsic fraud is one party's preventing the other from having his day in court." (*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.)

"'[F]raud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his

or her adversary, but unreasonably neglected to do so. . . . Generally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud. [Citation.]" (*Home Ins. Co., supra,* 96 Cal.App.4th at p. 27.)

Garcia's declaratory relief cause of action was based on Gharib's alleged false statements in negotiating the settlement of Garcia's employment action. As such, it was subject to the litigation privilege's bar on actions based on fraudulent statements made in the course of litigation. (*Home Ins. Co., supra,* 96 Cal.App.4th at p. 27.)

Garcia argues that the extrinsic fraud exception to the litigation privilege applies because Gharib's allegedly false statement that Garcia would be paid the settlement sum prevented Garcia from having his day in court—that is, if Garcia had not settled his employment action based on Gharib's fraud, Garcia would have had "the opportunity to have his case heard by a jury of his peers." To the contrary, Gharib's allegedly false statement was intrinsic to the employment action. There was nothing to prevent Garcia from fully participating in the proceeding. Garcia initiated the employment action and had the opportunity in that action to protect himself from LA Parking not paying on the settlement agreement by obligating Gharib and LA

Parking, jointly and severally, to pay the settlement sum. (*Home Ins. Co., supra,* 96 Cal.App.4th at p. 27.)

Garcia also asserts that there was extrinsic fraud in the negotiation of the settlement of his employment action because Gharib falsely represented that he was authorized to enter the settlement on LA Parking's behalf even though the California Franchise Tax Board had suspended LA Parking's "powers, rights and privileges" prior to the settlement conference.[10] Like his alleged statement concerning payment of the settlement sum, Gharib's statement concerning his authority to enter the settlement on LA Parking's behalf was intrinsic to the employment action. Here again, Garcia initiated the employment action and had the opportunity in that action to protect himself from the possibility that LA Parking would not pay on the settlement by investigating LA Parking's corporate status before agreeing orally to the settlement in court or later while preparing the written Settlement and Release Agreement.[11] (*Home Ins. Co., supra,* 96 Cal.App.4th at p. 27.)

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[10] Garcia acknowledges that he did not allege LA Parking's suspended status in his second amended complaint, but argues that he can plead that fact if allowed to amend.

[11] The Franchise Tax Board apparently suspended LA Parking's "powers, rights and privileges" on February 1, 2012. The settlement conference was held on June 7, 2012. Garcia's

Garcia contends that if he has failed to state a cause of action for declaratory relief in light of the litigation privilege, he can plead additional facts "about LA Parking's suspended status; the timing of that status, the voidability of the settlement agreement on that specific basis, and other matters." Garcia does not explain how the addition of allegations concerning LA Parking's suspended corporate status would allow him to state a valid cause of action for declaratory relief not barred by the litigation privilege and does not identify the "other matters" he would allege. Accordingly, Garcia has failed to meet his burden of proving the defects in his declaratory relief cause of action can be cured through amendment. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

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attorney signed the Settlement and Release Agreement on July 11, 2012.

DISPOSITION

The trial court's order sustaining Gharib's demurrer to Garcia's rescission and conversion causes of action without leave to amend and the judgment are reversed. The trial court's order sustaining Gharib's demurrer to Garcia's equitable estoppel and declaratory relief causes of action without leave to amend is affirmed. The matter is remanded for further proceedings. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

RAPHAEL, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.